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CREEPING JURISDICTION, ARE INTERNATIONAL STRAITS IN JEOPARDY?

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Abstract

A view of the international laws concerning both transit and innocent passage. A critical overview of factors which have the potential to create changes in those laws and a review of the importance of the straits affected by those laws from an operational perspective. The law of the sea has been with us for centuries, The concepts of mare liberum and mare clausum have been hammered into coexistence by international treaties. The 1982 Law of the Sea was crafted during both the Cold War and the environmental movement. The laws within the treaty concerning international straits were influenced by the maritime superpowers. The current international mindset focuses mainly upon the environment. International straits are of great strategic and operational importance due to the oil trade and the ability to trade space for time in a strait. The Operational Commander should be concerned with the potential for change in international straits. The environmental movement is ingrained within all Nations, and the move towards increasing jurisdictional control over vast sea areas via the EEZ foreshadows increasing control over international straits by Littorals

Creeping jurisdiction refers to the phenomena of law spilling over from one area to another. In this case, the question refers to the possibility of a Nation State obtaining increased jurisdictional control over an international strait which lies in or adjacent to that State's territorial sea or Exclusive Economic Zone. In view of today's increasing military operational tempo, it is imperative that the Operational Planner look at these internationally regulated choke points with a view towards possible changes in the availability of these strategic sites due to impending changes in either international law or regime of regulation. The consequences to operational planning resulting from the untimely loss or restricted use of one of these major sea lines of communication must be understood and planned for. In order to determine the possibility of jurisdictional creep occurring in these areas, some background knowledge of the laws which govern international straits and how they evolved is required.

EVOLUTION OF THE LAW OF THE SEA

There are essentially two central theories of law that have been applied to the seas over the last two thousand years. The concept of freedom of the seas versus the viewpoint that the seas are simply an extension into the sea of a Nation's sovereignty. The Romans were the first to write about freedom of the seas, and in the sixth century Roman law codified the concept. They were also the first to extend jurisdictional power into the sea. The "Theory of Glassators" put forth the concept of effective control over the Mediterranean Sea. The theory did not claim ownership, but effectively extended the reach of Caesar and served to suppress piracy.¹

Throughout the middle ages maritime nations claimed jurisdictional control over adjacent seas. When Columbus discovered the Americas, a new chapter in the law of the sea emerged. Spain claimed the new land but Portugal immediately challenged the claim. In order to avoid a military resolution, the Pope intervened creating an agreement in which the sea was divided between the two dominant powers. This agreement provided the foundation for the Treaty of Tordesillas. The treaty granted sovereign jurisdiction over the seas and the land lying beyond to both Spain and Portugal. It also allowed for navigational rights within each others jurisdiction.² This arrangement only worked well if you were a member of the two nations involved, but the

other maritime powers were not enamored with the situation. Unfortunately, without substantial backing, the other powers were forced to make due with the Treaty as it stood.

The concept of a closed sea was finally challenged by the Dutch in 1604. The argument was made that the seas are a common area available for the use of all mariners. The man making the argument was Hugo Grotius, who was defending Dutch shipping interests. In his thesis, *mare liberum* (open sea), Grotius eloquently argued for the concept of freedom of the seas.³ The British favored the more restrictive regime of a *mare clausum* (closed sea). In 1635, John Selden, a British scholar, expanded on the concept of *mare clausum*. He asserted that the sea of England was "that which flows between the sea of England and opposite shores and ports".⁴ Although the two concepts are contradictory, they have been massaged into coexistence. The proponents of *mare liberum* have never contested the right of a nation to exercise control over the territorial sea. What has been at issue is the breadth of the territorial sea. All proponents understood the inherent self interest in a territorial sea, control of piracy and a State's right of self-defense were strong motivating factors. By the end of the seventeenth century, both the concept of sovereignty over a reasonable territorial sea and freedom of the high seas were in vogue.

Early in the next century, Cornelius van Bynkershoek further refined the two concepts. He asserted that a coastal state could own the waters off the coast to the extent that they could affect those areas. The cannon-shot rule as it came to be known proposed that the control of the sea extends as far as a cannon shot, typically three nautical miles. Until the 1958 Convention on the territorial sea and the Contiguous zone a three nautical mile territorial sea was common.⁵

On November 16, 1994, the 1982 United Nations Convention on the Law of the Sea (UNCLOS III) entered into force, having been ratified by the requisite number of nations one year previously.⁶ In 1994, President Clinton forwarded the Law of the Sea Convention to the Senate, but they failed to ratify it. In spite of this the United States does accept the UNCLOS as the current law of the sea.⁷ The 1982 Convention is the latest attempt by the United Nations to put into place a comprehensive law of the sea treaty. Previous attempts were made and agreements were reached in the 1958 and 1960 conventions, but as noted by W.T. Burke "They did not, however resolve the two most outstanding controversies of the time: the width of the territorial sea and the extent of coastal authority over fisheries beyond the territorial sea."⁹

UNCLOS is the most comprehensive treaty ever devised concerning the law of the sea. It attempts to address every factor concerning the sea: exclusive economic zones, mineral rights, straddling stocks, territorial seas, archipelagic states, innocent passage, and transit passage are just a few of the topics that the convention covers in over four hundred articles.¹⁰ Like all treaties, UNCLOS is an attempt to codify common law and to provide a structured set of rules in order to alleviate disagreements between States.

One factor or major concern to the United States is the regime of transit passage. In the treaty, the regime of transit passage is a compromise of *mare clausum* and *mare liberum*. While the State has jurisdictional authority, all vessels and aircraft are afforded the freedom of navigation and over flight. The Law of the Sea Convention took almost ten years to draft, and the United States was a major player in shaping the treaty and in refining the articles of the convention. Within the framework of the 1982 Convention are laws relating to the transit of ships and aircraft through international straits. The laws establishing the rights of innocent and transit passage are the subject of this paper.

INNOCENT PASSAGE

Under Customary International Law and the 1958 Conventions, passage through international straits was treated according to the waters they comprised. If they were high seas, then rights of high seas navigation were awarded; if straits fell within territorial waters, then the rights of innocent passage applied. There is a distinction between the territorial sea and an international strait within a territorial sea. In an international strait, innocent passage could not be suspended, however, the prohibition on suspension of innocent passage did not prevent a State from imposing regulations and it did not provide for unlimited right of passage.¹¹ The 1958 convention required territorial sea passage to be "innocent" and allowed for the normal interests of Littoral States, including the protection from threats to their security.

TRANSIT PASSAGE

One of the driving factors of the 1982 Convention was the desire to establish an international standard for a territorial sea. In order to accomplish that, the regime of transit passage was devised as a compromise; it allowed for a twelve nautical mile territorial sea while also allowing traditional use of international straits.

When States began claiming a twelve nautical mile territorial sea, a number of international straits became enclosed within the territorial seas. The regime of transit passage applies to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."¹²

Rules governing transit passage and archipelagic sea lanes passage delineated in the 1982 Convention allow passage through international straits and are more liberal than rules governing innocent passage. Innocence is not a prerequisite for transit passage. Like innocent passage within an international strait, the Convention does not allow States to suspend transit passage.¹³ Transit passage provides ships, especially warships, greater latitude while transiting a strait. Keep in mind that the 1982 Convention had been a work in progress for almost ten years prior to the final draft. The United States and other major maritime powers had a significant amount of leverage in designing the treaty. The right of transit passage is tailor made for the Military. Air capable ships can operate aircraft, submarines can operate submerged and aircraft can over fly international straits.

There are however, a number of restrictions delineated by article 39 of the Convention which are much more specific than previous requirements. Transit passage must be solely for the purpose of continuous and expeditious transit. Transit ships must comply with generally accepted international regulations, procedures and practices for safety at sea and for the prevention, reduction and control of pollution from ships. Ships and aircraft must proceed without delay through or over the strait. They must refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations. They must refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress. And finally, they must comply with other relevant provisions of the convention. Research or survey activities undertaken without the prior permission of the Littoral States is prohibited.¹⁴ If a vessel is operating in violation of any of the restrictions, then the transit through an international strait would come under the rules of innocent passage. An activity that does not fulfill the requirements of being both continuous and expeditious for instance, could render the passage outside 'transit passage'.

States are prohibited from taking action against warships if they are not in compliance with transit passage, but the Nation owning the warship is liable for any damages caused by the vessel. UNCLOS does allow States bordering straits to adopt laws and regulations that are aimed at the prevention, reduction and control of pollution. The State needs to utilize internationally recognized standards or international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait. However, the laws and regulations can not be discriminatory or have the practical effect of denying, hampering or impairing the right of transit passage and need to have been duly publicized.¹⁵ This is an area that could potentially degrade into a quagmire of regulation. Note that there is a difference between warships and commercial vessels. The commercial vessel is much more susceptible to regulation than is the warship. If a foreign ship not entitled to sovereign immunity has committed a violation of the laws and regulations relating to the provisions in Article 42 relating to safety and pollution prevention, reduction and control, causing or threatening major damage to the marine environment of the straits, then States bordering the straits may take appropriate enforcement measures. The language of the Convention is open to interpretation in a number of areas, a careful analysis of the Convention is required and is in fact one of the reasons that jurisdictional creep is unavoidable. Over time, the treaty will have to be further refined in order to resolve discrepancies in the way different States interpret each article.

Both innocent passage through international straits and transit passage can not be suspended. The Littoral State may not impose restrictions on passage. But what about the Littoral State's right to safeguard the environment and the economic resources within the strait and also within the territorial sea? The rights of the State must coexist with the strategic and economic necessity of an open strait.

CHOKE POINTS

The Operational Planner needs to keep in mind the factors that influence and shape international treaties. When the 1982 convention was being drafted, the Cold War was still on and one of the primary reasons for the transit passage article was so that the superpowers could use the straits to their advantage, strategically and tactically. They needed to keep ballistic missile submarines hidden and conduct anti submarine warfare within a strait which required aircraft to be airborne. Since the fall of the USSR,

international commerce, specifically the oil trade has usurped the position of prime importance from the military.

Today, the biggest player when considering the importance of international straits, in terms of money and power, is the oil tanker trade. From the perspective of the Operational Planner, the real value of international straits is in what they do for the economic machine that ultimately drives the war effort. A look at the statistics provides us a frame of reference.

The following is paraphrased from the Department of Energy:

Bab el-Mandab connects the Red Sea with the Gulf of Aden and the Arabian Sea. 1997 estimates place oil transport through the area at 3.3 million barrels per day bound for Europe, the United States and Asia. Closure of the Bab el-Mandab could keep tankers from the Persian Gulf from reaching the Suez. The Bosphorus Straits divide Asia from Europe and connects the Black Sea with the Mediterranean Sea. Approximately 1.2 million barrels/day flow through these straits bound for Western and Southern Europe.

The Bosphorus is an international strait that is bound to be further regulated simply due to the amount of tanker traffic trying to get through the straits. At its narrow point, it is only 1.5 miles wide and is one of the world's most difficult-to-navigate waterways. Many of the proposed export routes for forthcoming production from the Caspian Sea region pass westwards through the Black Sea and the Bosphorus en route to the Mediterranean Sea and world markets. Exports through the Bosphorus have grown since the breakup of the Soviet Union in 1991, and there is growing concern that projected Caspian Sea export volumes exceed the ability of the Bosphorus to accommodate the tanker traffic. Turkey is concerned that that the projected increase in large oil tankers would pose a serious navigational safety and environmental threats to the Bosphorus.

The Strait of Hormuz connects the Persian Gulf with the Gulf of Oman and the Arabian Sea. 14 million barrels per day flow out of the gulf bound for Japan, United States, Western Europe. At its narrowest, the strait consists of 2-mile wide channels for inbound and outbound tanker traffic, as well as a 2-mile wide buffer zone. Closure of the Strait of Hormuz would require use of longer alternate routes at increased transportation costs. Such routes include the 5 million barrels/day capacity Petrolina and the Abqaiq-Yanbu natural gas liquids line across Saudi Arabia to the Red Sea.

The Strait of Malacca connects the Indian Ocean with the South China Sea and the Pacific Ocean. 8.2 million barrels/day flowed through the straits in 1996. The narrowest point of this shipping lane is the Phillips Channel in the Singapore Strait, which is only 1.5 miles wide at its narrowest point. This creates a natural bottleneck, with the potential for a collision, grounding, or oil spill. If the strait were closed, nearly half of the world's fleet would be required to sail farther, generating a substantial increase in the requirement for vessel capacity. All excess capacity of the world fleet might be absorbed, with the effect strongest for crude oil shipments and dry bulk such as coal. Closure of the Strait of Malacca would immediately raise freight rates worldwide.

These examples provide a vivid picture of the economic importance of the straits, and it follows that the oil flowing via commercial trade is also a significant factor in any military deployment.

In determining whether or not Littoral States may gain increasing jurisdictional control over vital choke points, we need to look at the agenda of the International Maritime Organization (IMO). In 1998, the Secretary General of the IMO published his perspective on the IMO and where he sees the organization going.

The charter of the IMO is "safer shipping and cleaner oceans"¹⁶ As some of the world's most crucial international straits become more crowded and vessel traffic separation schemes are imposed in order to increase safety of shipping, States will continue to impose increasingly tighter controls on tanker shipping. Is there any reason not to impose these controls on non-commercial shipping? The strait of Malacca now has an operational vessel traffic management system. Although use of the system is optional, it will take only one accident to incite the public to demand military vessels also utilize the system.

INFLUENCING FACTORS

In 1973, the International Convention for the Prevention of Pollution from Ships was adopted by the IMO.¹⁷ In 1978, the IMO was made the responsible international organization for monitoring the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter at Sea, more commonly referred to as the London Convention.¹⁸ The International Community is becoming "Green," leaning towards practices which are environmentally friendly. An article from the 1992 Rio Declaration, which was an international meeting between Nations to confer on environmental issues, reflects the direction world opinion continues to take: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."¹⁹ This policy views the oceans as a common area that must be shared and at the same time safeguarded in order to preserve fragile ecosystems. These concerns for the environment, in combination with article 42 of the 1982 Law of the Sea Convention, which says: "States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect to all or any of the following: (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily waste and other noxious substances in the strait"²⁰ combine to empower States to formulate regulations that safeguard the environment.

As concern over environmental protection grows, Littoral States will attempt to utilize article 42 in conjunction with the precautionary principle to impose tighter restrictions on transiting vessels. The United

States is the leader in doing just that. In the Straits of Juan De Fuca, the State of Washington has imposed tighter controls on shipping than are required by either the United States or by the International Maritime Organization. This regulation, which is not in conflict with the right of innocent passage or transit passage, does in fact have the effect of restricting vessel traffic within the Strait of Juan De Fuca.

FOCUSING EVENTS

History is filled with events which are, in hindsight, thought of as milestones, or events which precipitated changes in law or regulation because they occurred at the right time and within the proper "atmosphere." These events are known within the legal community as focusing events. On January 29, 1969 an oil platform six miles off the coast of California had an oil spill that affected eight hundred square miles of Southern California waters. Hundreds of sea birds and mammals died, fishermen lost their livelihood and the population of the United States became very concerned with the environment. The Santa Barbara Oil Spill is commonly viewed as the impetus to the environmental movement.²¹ The fallout of that event: The first "Earth Day" occurred in the spring of 1970, and the United States passed the Coastal Zone Management Act in 1972.

The Exxon Valdez oil spill in 1989 resulted in passage of the Oil Pollution Act of 1990. OPA 90 put into place requirements for double hulls on tanker vessels. The International Maritime Organization incorporated double hull requirements into their guidelines.

The reality of the situation for the Operational Commander is that he is now faced with two options in addressing international straits. The first option is to use the strait, exercising transit passage to the maximum extent possible, thereby insuring that he has not permitted his rights to become invalid under the common law concept of "acquiescence" which says basically that if you don't exercise your rights, you may lose them.²² But if this is the course of action selected, then just one focusing event is all that will be required to cause the international community to reevaluate, and possibly amend transit passage provisions within the 1982 Convention. His second option is to utilize transit passage infrequently, but often enough to insure acquiescence does not occur. If this is his course of action, the right of transit passage may survive slightly longer.

Another potential area for creep exists due to the vagueness of the articles of the convention. For example, there are some anomalies which are potential areas of dispute that could lead to jurisdictional creep. The Convention does not differentiate between international straits that previously had a "High Seas" corridor and are now closed off by the territorial sea and those straits which still have a high seas corridor, but the navigable channel now falls within the territorial sea. The question is thus raised: Is a vessel utilizing transit or innocent passage in this case?²³ If the international strait is closed off by a twelve nautical mile territorial sea, then transit passage can be conducted on any navigable course through the strait, from baseline to baseline. The possibility for ships utilizing any navigable portion of an international strait provides much greater freedom of movement for the transiting unit, be it aircraft, ship or submarine. The unit is now able to claim transit passage through areas where, prior to the 1982 Convention, only innocent passage applied. This quirk in the regime of transit passage will ultimately result in a dispute that can be only resolved with more closely defined boundaries for international straits, thus further limiting areas of the strait. This also becomes a no win situation for the Operational Commander. In order to preserve this right, units must be tasked periodically to exercise those rights, but this must be tempered with a realization that abuse of this right, routinely transiting through navigable areas within the territorial sea of another Nation while exercising transit passage, may have the opposite desired effect. It may provoke the Littoral State to impose vessel traffic separation schemes and regulatory constructs that impose increasing controls over transiting traffic.

THE SHRINKING HIGH SEAS

In 1983, President Reagan established the Exclusive Economic Zone which extends to 200 nautical miles seaward of the baseline from which the territorial sea is measured. The EEZ is one other factor that has a large potential to affect the right of transit passage. The Exclusive Economic Zone has effectively reduced the area of the high seas by forty percent. All coastal nations utilize the oceans for multiple uses. Competitors for limited resources include commercial and recreational fishing, oil and mineral rights exploration, maritime commerce, and recreation. The existence of an international strait in the territorial sea of a State places that State in a difficult position. The State wants to maximize the utilization of the resource for all users, yet international law places restrictions on the States' ability to restrict international traffic exercising transit or

innocent passage. Although the Law of the Sea Convention prescribes sovereign jurisdiction to the adjacent State, some States exercise rights of ownership over their straits. Case in point: In 1988 Indonesia announced the temporary closure to passage by all ships to the straits of Sunda and Lombok, which are the only other commercially navigable passages between the Indian Ocean and the South China Sea.²⁴ In 1985, Italy temporarily suspended passage through the straits of Messina by ships of more than 10,000 tons carrying oil or other dangerous substances for environmental reasons.²⁵

One other example of creeping jurisdiction: A number of Nations have serious concerns about the transit of nuclear waste through their waters and Exclusive Economic Zones. They include: Uruguay, Colombia, Argentina, Brazil, Indonesia, Portugal, Ecuador, Philippines, Chile, Spain, Puerto Rico, and Chile. Chile in particular has cited the precautionary principle as enunciated in the Rio Declaration as the basis for banning a highly radioactive shipment from entering its Exclusive Economic Zone.²⁶

CONSIDERATIONS FOR THE OPERATIONAL COMMANDER

Is a freedom of navigation mission necessary? If so, what is the associated risk? Will the mission have the effect of raising negative views or are we simply trying to assert our rights under an international treaty, or common law? The Operational Commander should not leave these decisions for the Tactical Commander, as the big picture may elude the commander at the tactical level. Straits are important to the Operational Commander for a number of reasons. It allows the freedom of over flight, the ability to utilize what would otherwise be a territorial sea for deployment and sustainment, thereby reducing the length of sea lines of operation and communication. In the case of the major international straits the Operational Planner must utilize forces to gain the greatest advantage from and deny advantage to the enemy. Straits can be used to channel the enemy and mass forces. International straits and the right of innocent and transit passage are force multipliers, straits allow the United States to project power, both maritime and air, via sea lines of communication that cannot be closed to either warships or military aircraft.

The strategic importance of the right of transit passage and the ability to utilize the worlds straits has been seen most recently in the Gulf War. The Straits of Malacca, Gibraltar and Hormuz were all utilized in order to minimize sea lines of communication and deploy forces to the theater in minimal time. That is the

essence of an international straits utility. When the United States bombed Libya in 1986, the only route available for United States Air Force air craft was through the Strait of Gibraltar utilizing transit passage. The regime of transit passage is very useful to the United States in shaping foreign policy and is not exempt from future changes due to a changing international climate. Operationally, straits provide the most direct sea route to the theater of operations. Strategically, they are economic lifelines over which flows the oil tanker trade that fuels the war machine.

In the past, the Operational planner has had to make a conscious decision to either utilize the strait for deployment of military equipment, and risk being caught in the choke point or not use it if time is available, and use alternate longer routes that bypass the strait. After the commanders estimate of the situation has been addressed, wouldn't it be nice to have both options available?

WHAT IF...?

What if a Nuclear Submarine operating in its normal mode (submerged) in an international strait has an accident, be it grounding, nuclear problem or collision? In today's environmental climate which is stressing the precautionary principle, would the regime of transit passage survive in the face of the international outcry? The Operational Commander must weigh the relative potential costs of choosing to utilize the full spectrum of available options within that international strait. What if the event closed the strait for a number of days? The major user, the oil tanker trade would be immediately affected. All of this from a simple human error. It is the responsibility of the Operational Commander to insure that subordinates and superiors are aware of the ramifications of deployments and sustainment operations that transit an International Strait. Would international concern for environmental considerations outweigh the operational needs of the Navy? Would the world condemnation force tighter constraints on when, how fast and in what mode naval vessels could transit international straits? The gathering clouds of environmental protectionism are harbingers of caution, the savvy Operational Planner should take heed.

CONCLUSION

If one steps back and views the evolution of the law of the sea, it is obvious that the law is dynamic and shaped by the interests of states. In light of this, it is a simple step to see that those things that are owned are subject to the restrictions and constraints imposed by the owner. In the case of international straits that fall within a State's territorial sea there is a paradox, while the State has a legitimate interest in those waters as far as ownership of the resources and control of the area for safety of navigation, the 1982 Law of the Sea Convention specifically restricts the suspension of transit passage. The State cannot legally stop vessels from utilizing the strait. Freedom of Navigation Operations are used to insure the right of innocent and transit passage, and they must be conducted with the utmost care in order to avoid potential focusing events which could affect future world opinion and affect international law. Maritime pre-positioning and forward deployed vessels will be of greater importance if international straits become overly regulated. The ability to deploy forces via international straits may be limited by the vessel traffic management systems that are being erected for the safety of navigation.

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